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CASE NO.
IN THE UNITED STATES SUPREME COURT
October Term 1997

HARRY K. SINGLETARY,
Secretary, Florida Department of Corrections,
Petitioner,

vs.

HAROLD SNOWDEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Has a habeas petitioner fairly presented his claim of a denial of due process based on a state evidentiary ruling, where no specific claim was raised in state court and the sole reference to any alleged due process violation was one sentence, that the state evidentiary ruling denied him a fair trial?

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OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported at Snowden v. Singletary, 135 F. 3d 732 (11th Cir. 1998).[A1].[1] The decision of the District court of Appeal of Florida, Third District is reported at _537 So. 2d 1383

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit's opinion was filed on February 18, 1998 and rehearing was denied on May 4, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[1] The symbol "A" followed by the appropriate number represents a citation to the materials contained in the Appendix to this pleading.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, §I, United States Constitution, provides, in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE AND FACTS

Respondent, Harold Snowden, was the Petitioner-Appellant in the Eleventh Circuit. The District Court of Appeal of Florida, Third District set forth the following facts of the case regarding Snowden's crimes.

> At the time of the events in question, Janice Snowden, the defendant's wife, was the babysitter for LB and JB. These children, and others, were left regularly at the Snowden home during daytime hours. Janice Snowden frequently placed the children in her husband's care while she ran errands. The defendant, a South Miami police officer, was home in the daytime because he worked the night shift.
>
> LB, six years old at the time of trial, was the only witness competent to testify to the crimes allegedly committed against her and her infant brother. A short time after the incidents which formed the charges, LB was questioned by her parents, extensively interviewed by a psychologist, and physically examined at the Jackson Memorial Hospital Rape Center. Dr. Laurie Braga, the psychologist--whose interview with LB was videotaped--elicited from the young girl that one time when Janice left the house on an errand, Grant came into the bedroom where she and the baby were and turned off the television. Grant took LB's clothes off first and then his own. Grant then touched his penis to her "pee-pee" and her "butt," placed his hand on her pee-pee, and placed his penis in the mouths of her and her brother. The doctor at the Rape Center examined LB and found that she suffered from vaginal redness, odor, and discharge. After observing a slide (wet smear) under a microscope, the doctor diagnosed LB as having gardnerella vaginitis, a sexually transmitted disease rarely found in young children. LB presented no other physical symptoms

of having been sexually abused. About a week later, LB told her mother about what Grant had done to her.

During the two years that passed while the case was being readied for trial, LB's parents brought her to the State Attorney's Office about ten times. Sometimes she would talk to an Assistant State Attorney, and sometimes, not wanting to talk, she would just play.

When she was five, LB was interviewed by another doctor, an expert in child development. Although she was visibly uncomfortable with discussing the incident with this doctor, LB used some anatomically correct dolls to illustrate the various sexual acts that she said Grant had performed on her and her brother. To test her ability to discriminate between various facts, thereby testing the accuracy of her previous statements, the doctor asked LB whether Grant had kissed her pee-pee. LB said no.

LB was also deposed by Snowden's attorneys. In the deposition, LB said things she later denied or which were contradicted by her mother. Thus, at her deposition, she testified, inter alia, that she had told her parents immediately that Grant had done something to her, that Grant touched her pee-pee with only his hand and nothing else, and that Grant had only patted her butt.

These and other inconsistencies, as well as LB's numerous trips to the State Attorney's Office and the psychologist's videotaped interview, were to later form the basis for Snowden's contention at trial that LB's accusations were complete fabrications born in the leading questions asked by Dr. Braga and nurtured by the retelling in countless interviews at the State Attorney's Office. LB's vaginitis, argued Snowden, was misdiagnosed as a sexually transmitted

disease instead of what it really was, a typical rash and vaginal discharge associated with children not yet toilet trained.

B.

To the State's surprise, LB, age six at the time of trial, was unable to identify the defendant in court as the man she knew as Grant, whom she said had molested her. To overcome this deficiency and the inconsistencies between LB's trial testimony and her pretrial responses, and to firmly establish that the defendant was the person who had sexually assaulted LB and her brother, the State presented evidence that Snowden had sexually abused two other young children who had also been left in the daytime care of his wife. This evidence, which Snowden strenuously disputed, consisted of the testimony of a five-year-old boy named GW and his parents, a six-year-old girl named KM and her mother, and certain other witnesses who had examined GW and KM for signs of sexual abuse. Neither of these children presented any physical evidence of having been sexually abused, except that GW was tested twice for oral gonorrhea, first yielding a positive and then a negative test result. After receiving penicillin treatment, GW was again tested, yielding a negative test result.

Snowden's response to the similar fact evidence was to attack the credibility of the children, cast doubt on the veracity of the gonorrhea diagnosis, and argue that these children were also mistaken--that they too had been improperly influenced by a host of concerned parents, prosecutors, and doctors. His objections to the similar fact evidence were, as we have said before, limited to the claim that although the testimony of GW and KM was relevant, the testimony of their supporting casts made their similar fact evidence a feature of the trial. Thus, Snowden

made "feature" objections to testimony of GW's father about what GW had told him and what the defendant said when GW's parents accused him of having molested GW; testimony of a doctor who examined KM and found no physical evidence of sexual abuse; testimony of Janice Snowden that GW and KM were not "problem" children; and testimony of an HRS microbiologist regarding the accuracy of gonorrhea tests and the likelihood and causes of false negative and false positive test results.

The defendant's case consisted of testimony from a psychologist who testified that he had told GW's father to stop putting pressure on his son to say things he was not ready to say--particularly that the defendant had put his penis in GW's mouth. LB's father testified that his daughter had a history of redness and vaginal itching and had initially denied having been molested by Snowden. The defense also called a pathologist who testified that a year and a half after the alleged incident, Snowden had tested negative for gardnerella and that the culture that was performed would have also revealed the presence of gonorrhea. Another doctor testified that gardnerella vaginitis is often misdiagnosed, albeit in adults, particularly where a wet smear, as here, is used. The defendant also presented evidence that his wife was treated in 1982 for vaginal itching and redness, which was diagnosed as trichomonas. She was tested for gonorrhea and syphilis in 1984, but did not require treatment. Finally, the defendant offered the videotape of the Braga interview to show that LB had been brainwashed.

On the State's rebuttal, Dr. Braga explained the techniques that the jury saw in the videotaped interview of LB and denied having brainwashed LB.

> Throughout the trial, the court, the State, and the defense repeatedly reminded the jury of the limited purpose for which the similar fact evidence was being received. In his opening statement, the defendant's attorney cautioned the jury that, although they would be hearing testimony of collateral crimes, they were not being asked to decide the guilt or innocence of Snowden as it related to these other children. Before any testimony relating to the collateral crimes was introduced, and again at the close of the evidence, the court instructed the jury on the limited use of the evidence and that the defendant was not on trial for crimes not charged in the information. Both the State's and the defendant's closing arguments centered on the acts charged in the information and the testimony and credibility of LB. The similar fact evidence was used by the State simply to show the identity of the defendant and to rebut the defense's contention that LB was lying: it was just not possible, the State argued, to have three children fabricate such identical stories. The defense also repeatedly reminded the jury in closing that the defendant was not on trial for acts that KM and GW testified about and that it would not be fair to convict him based on his bad character. [Footnotes omitted] [A26-A30].

Based on the foregoing evidence Snowden was convicted of five counts of sexual battery. [A19].

On direct appeal, Snowden raised a number of issues. The issue which the habeas corpus petition was granted was presented to the District Court as follows:

> THE TRIAL COURT ERRED BY IMPROPERLY ADMITTING PRIOR CONSISTENT STATEMENTS OF LOREN BRUTKIEWICZ AND EXPERT TESTIMONY TO BOLSTER HER CREDIBILITY. [A34].

The operative facts of this claim was that Dr. Miranda bolstered the credibility of Loren when he was allowed to testify that in his experience only 5 of 1,000 children fabricated a claim of sexual abuse. [A34]. An objection to this testimony was made on the ground that the testimony allowed the expert to make an ultimate determination of the child's credibility. [A47]. Snowden's brief on this claim did not allege that Dr. Miranda's testimony violated the due process clause of the Fourteenth Amendment; did not cite federal cases which held that this type of evidence violated the due process clause of the Fourteenth Amendment; and the state cases cited discussed only state law. The only claim made in the brief was that "[b]y permitting improper expert testimony to bolster Loren's credibility – a clear invasion of the jury's sole province -- Mr. Snowden was denied a fair trial." [A33-A35].

The State, in its answer brief, addressed this claim as a violation the state's evidence code. Specifically that Dr. Miranda's testimony was proper under section 90.703, Fla. Stat. (1987), which allows for opinion testimony on the ultimate issue. The State's brief did not mention the due process clause of the Fourteenth Amendment or rely on federal cases which cited the due process clause of the Fourteenth Amendment when discussing the propriety of this type of testimony. [A36-A44].

Snowden filed a reply brief. However, it also failed to allege that the testimony violated the due process clause of the Fourteenth Amendment; it also did not cite federal cases which held that this type of evidence violated the due process clause of the Fourteenth Amendment; and the state cases cited also discussed only state law. [A45-A46].

The Third District in affirming Snowden's convictions did not cite any federal authority for rejecting this claim. In fact, the Third District, in rejecting this claim, found that it was not worthy of discussion. [A19].

The Magistrate, in his report and recommendation, found the bolstering claim was only presented to the state court as a violation of state evidentiary rules. The Magistrate then found that the same argument was for the first time being made to support a due process

claim and found that due process was not violated. [A48]. The District Court then adopted the Magistrate's Report and Recommendation.

On appeal to the United States Court of Appeals for the Eleventh Circuit, Petitioner contended that this claim was not fairly presented to the state courts. However, the court found that Snowden properly presented to the state court the issue of the expert's bolstering of the child witnesses as a due process violation. The court's holding was based on the following sentence found at page 56 of Snowden's direct appeal brief: "By permitting improper expert testimony to bolster [the child's] credibility -- a clear invasion of the jury's sole province -- Mr. Snowden was denied a fair trial. [A5]. The court then found that the expert's testimony violated due process rendering Snowden's trial fundamentally unfair. The court found due process was violated because the case against Snowden was based almost entirely upon the stories told by three, young children witnesses and the only physical evidence that a child might have been abused by anyone was that one of the children had been treated for an ailment which can be transmitted sexually, but is also transmitted by other means. [A9-A12]. A motion for rehearing was filed which once again raised the contention that the claim had not been fairly presented to the state court and thus was in procedural default. The motion also contended that, even if the claim was exhausted, the court overlooked the abundant nature of the untainted evidence in order to find the erroneous admission of the expert's testimony to have rendered the trial fundamentally unfair. The motion for rehearing was denied on May 4, 1998. [A16-A17].

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW THAT THE CLAIM THAT THE TESTIMONY OF THE EXPERT BOLSTERED THE CHILD WITNESSES FAIRLY PRESENTED TO THE STATE COURT A CLAIM THAT THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WAS VIOLATED WHERE THE DUE PROCESS CLAUSE WAS NEITHER MENTIONED IN THE BRIEF NOR CITED BY SUPPORTING CASE LAW CONFLICTS WITH DECISIONS OF THIS COURT AND DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL.

This Court "has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554, 115 L.Ed.2d 640 (1991). The exhaustion-of-state-remedies doctrine, now codified at 28 U.S.C. Secs. 2254(b) and (c), reflects a policy of federal-state comity to give the State "the initial 'opportunity to pass upon and correct alleged violations of its prisoners' federal rights.' " Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971). Once the federal claim has been "fairly presented" to the state courts, the exhaustion requirement is satisfied. Id.

The Court recently restated the Picard exhaustion analysis in Duncan v. Henry, 513 U.S. 364, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). The Court explained:

> In Picard v. Connor, we said that exhaustion of state remedies requires that petitioners "fairly presen[t]" federal claims to the state courts in order to give the State the " 'opportunity to pass upon the correct' alleged violations of its prisoners' federal rights" (some internal

> quotation marks omitted). If state courts are to be given the opportunity to correct alleged violations of prisoner's federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 513 U.S. at 365-66, 115 S.Ct. at 888.

In Duncan v. Henry, petitioner Robert Henry did not apprise the state court of his claim that the trial court's evidentiary ruling was not just a violation of state law, but also a denial of his Fourteenth Amendment due process rights. Id. at 366, 115 S.Ct. at 888. The Court, therefore, concluded that Henry had not met the exhaustion requirement because he had not alerted the state courts to his federal claim.

In Gray v. Netherland, ___ U.S. ___, 116 S. Ct 2074, 2081, 135 L. Ed. 2d 457 (1996), this Court succinctly restated the exhaustion requirement of Picard. It requires that for the purpose of exhausting state remedies, a claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee as well as a statement of facts which entitle the petitioner to relief. A statement of facts sufficient to support a constitutional claim without reference to the to the legal basis for that claim is not sufficient.

After Picard, Duncan, and Gray a due process claim is fairly presented to a state court when the claim specifically states not only that the due process clause of the Fourteenth Amendment was violated, but also how it was violated. In the instant case, the Eleventh Circuit ignored this requirement when it found that Snowden's state court claim that the trial court erred by improperly admitting expert testimony to bolster Loren Brutkiewicz' credibility fairly presented to the state court that the evidentiary error also

violated the due process clause. The sole basis for the Eleventh Circuit's finding was the following statement in Snowden's brief on direct appeal: "By permitting improper expert testimony to bolster [the child's] credibility -- a clear invasion of the jury's sole province -- Mr. Snowden was denied a fair trial." [A5]. The Eleventh Circuit did not support its holding that the claim was fairly presented to the state court by virtue of Snowden's brief citing to federal cases which dealt with this type of claim as a due process claim, which it could not do since no federal cases were cited. The Eleventh Circuit also did not cite to the state cases which Snowden relied on in his brief as ones which addressed this claim as a due process violation, since, as will be shown hereinafter, they did not so address this claim.

In light of the foregoing deficiencies in Snowden's state law claim, the Eleventh Circuit did acknowledge that Snowden did not specifically state on direct appeal that the issue of the expert testimony about the truthfulness of the child witnesses was to be reviewed under the Federal Constitution. [A5]. However, it found the foregoing one sentence in defense counsel's seventy page brief sufficient to have alerted the state court that Snowden was asserting that the evidentiary ruling under attack denied him the due process of law guaranteed by the Fourteenth Amendment. But see, Gonzalez v. Sullivan, 934 F. 2d 419 (2nd Cir. 1991)(When relying on a broad constitutional doctrine like the Fourteenth Amendment, counsel in state court should support the claim by a factual premise and by citation to federal cases in order to effectively raise the federal claim in state court so that it may later be presented in federal court.)

Thus, under the Picard, Duncan, and Gray exhaustion requirement, the Eleventh Circuit erred when it found that the bolstering claim was fairly presented to the state court. Since due process, the specific federal guarantee relied upon in federal court, was never mentioned in state court, the claim was unexhausted and therefore the merits of the claim should not have been the basis for granting the writ and ordering a new trial.

Even if Duncan and Gray only modified Picard by repudiating the "essentially the same argument" theory of exhaustion, the due process claim was still not fairly presented to the state court. The

bolstering claim was not fairly presented because it only presented "essentially the same argument" to the state court without alerting the state court that the claim also was based on the due process claim.

Prior to Duncan several Courts of Appeal, including the Eleventh Circuit, found that there were four ways a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing a specific section of the United States Constitution. These ways were (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation. Watson v. Dugger, 945 F. 2d 367, 371 (11th Cir. 1991); Daye v. Attorney General of State of New York, 696 F. 2d 186, 194 (2nd Cir. 1982). The last two of the foregoing ways allowed a state defendant to exhaust his constitutional claim by merely stating the operative facts as long as such facts gave rise to the constitutional principle subsequently asserted in federal court. This manner of exhaustion has been denoted as the "essentially the same argument" method. Tamapua v. Shimoda, 796 F. 2d 261 (9th Cir. 1986).

In Tamapua, the petitioner had argued in state court that the indictment and evidence presented against him were insufficient, and that the act for which he had been convicted was not a crime. Id. at 262. In his habeas petition, he argued that his federal due process rights were violated because he was convicted of an act that was not a crime. Id. The court noted that his argument on habeas was "essentially the same" as the argument presented to the state court and held that he had satisfied the fair presentation requirement because he had provided the state supreme court with a full and fair opportunity to address the substance of his claims. Id. at 262-63. In so holding, the court relied on two factors: First, the petitioner's primary contention in state court was that he had been convicted with insufficient evidence, and sufficiency of the evidence used to convict is a fundamental concern of the due process clause. Id. at 263. Second, the petitioner's reply brief to the state supreme court cited a state case "for the proposition that '[i]t is well established, as a precept

of constitutional as well as statutory law, that an accused in a criminal case can only be convicted upon proof by the prosecution of every element of the crime charged beyond a reasonable doubt.'" Id.

In Henry v. Estelle, 33 F. 3d 1037 (9th Cir. 1993), rev'd sub nom. Duncan v. Henry, 513 U.S. 364, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995), the petitioner had argued in state court that the admission of prior act testimony had violated California evidentiary law and required reversal because it had resulted in a "miscarriage of justice" under the California Constitution. Henry, 33 F.3d at 1040. In his habeas petition, the petitioner claimed that the admission of the prior act testimony violated the Due Process Clause of the Fourteenth Amendment. Id. The Ninth Circuit, relying on Tamapua, held that the petitioner's federal due process claim had been exhausted because it presented "essentially the same" operative facts and legal theory as presented in state court. *Id.* at 1040-42.

This Court reversed, and in so doing impliedly disapproved the "essentially the same" standard of Tamapua. Duncan v. Henry, 513 U.S. 364, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). This Court reasoned:

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Id. Because the petitioner "did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment," his federal claim was unexhausted. Id.

After Duncan, the "essentially the same argument" standard is no longer viable. If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court.

Since Duncan, the Ninth Circuit has specifically repudiated the "essentially same argument" standard. Johnson v. Zenon, 88 F. 3d 828, 830 (9th Cir. 1996). The Seventh Circuit, however, has specifically continued to utilize said standard to determine if a claim was fairly presented to the state court. Moleterno v. Nelson, 114 F. 3d 629, 634 (7th Cir. 1997).

The Eleventh Circuit, in the instant case, although it did not specifically state that it was utilizing the "essentially same argument" standard to determine that the bolstering claim fairly presented to the state court the due process claim. However, it is obvious from it analysis, that the Eleventh Circuit did utilize the "essentially same argument" standard to determine that the bolstering claim fairly presented to the state court the due process claim.

Snowden's brief on direct appeal contained the operative facts of the claim but did not cite to the due process clause of the Fourteenth Amendment. The brief did not rely on pertinent federal cases employing constitutional analysis and did not rely on state cases employing constitutional analysis in like fact situations. The Eleventh Circuit, after acknowledging that Snowden did not specifically state on direct appeal that his bolstering claim should be reviewed under the Federal Constitution, held that the claim was fairly presented on direct appeal when after Snowden recited the operative facts he contended that the trial court erred "[b]y permitting improper expert testimony to bolster [the child's] credibility -- a clear invasion of the jury's sole province -- Mr. Snowden was denied a fair trial." [A5].

Since Snowden failed to specifically alert the state court, either by relying on the due process clause or by citing federal or state cases which relied on due process, the claim that the improper bolstering violated due process was fairly presented could only be supported by the "essentially same argument" theory. This is so because the

assertion of the claim's terms is particular enough to call to mind the due process clause of the Federal Constitution or the allegation of the pattern of facts is within the mainstream of due process litigation. Thus, the Eleventh Circuit's opinion is directly at odds with this Court's opinion in Duncan.

After Duncan, a claim in state court fairly presents a claim under the Federal Constitution when a petitioner specifically refers to the Federal Constitution, cites federal cases which rely on the Federal Constitution, cites to state cases which analyze the claim under the Federal Constitution, or the state court uses federal law and federal authority to decide the claim. Morris v. Norris, 83 F. 3d 268 (1996). Using the proper analysis, it can not be said that Snowden's bolstering claim was fairly presented to the state court on direct appeal, since he did not specifically allege that the due process clause was involved, he did not cite any federal cases and the state appellate court did not address this claim in its opinion. The only manner in which Snowden can attempt to establish that the claim was fairly presented is by showing that the state cases he relied on analyzed this claim as a due process violation. A clear reading of these cases, establishes that Snowden never fairly presented this claim to the state court. [A33-A35, A45-45].

The first case cited in the Snowden's state court brief is Barnes v. State, 93 So. 2d 863 (Fla. 1957). In Barnes, the Supreme Court of Florida reversed for a new trial because the trial judge failed to give a jury instruction concerning Barnes' theory of defense because the judge felt that the evidence supporting the defense was not credible. In so ruling, the court stated that the jury is the sole arbiter of the credibility of witnesses. The case was decided under the general state legal principle that a defendant is entitled to have the jury instructed on his theory of defense when it is supported by any evidence. Next cited was Bowles v State, 381 So. 2d 326 (Fla. 5th DCA 1980), where the court found that it was error to permit four police officers to testify that the defendant's general reputation in the community for truth and veracity was bad and that they would not believe the defendant under oath. The case was decided under Florida's Evidence Code, § 90.08, Florida Statutes (1977) and Florida's harmless error statute §924.33, Florida Statutes (1977). The third case cited Silvertri v. State, 332 So.

2d 351 (Fla. 4th DCA 1976), a new trial was granted based on a comment made by the prosecutor during closing argument to the jury which comment indicated that the state's witnesses were truthful because they convinced the police that they were telling the truth. The case was decided on general state law that the argument in question denied defendant a fair trial. Next was Holliday v. State, 389 So. 2d 679 (Fla. 3d DCA 1980), where the court found it was error to allow the victim's psychiatrist to testify that the victim was not a pathological liar. The court found, citing only to one state case, that the doctor's statement was personal opinion and was a clear invasion of the province of the jury. The claim by itself was not prejudicial enough to grant a new trial. Then Farley v. State, 324 So. 2d 662 (Fla. 4th DCA 1975) was cited, and there the court found that under the facts of this case the admission of the physician's opinion that the victim was raped was error. However, the court noted that in some cases this same testimony would be admissible or harmless. The court limited its holding to the particular facts and relied solely on state cases. Finally Snowden cited Norris v. State, 503 So. 2d 911 (Fla 5th DCA 1987), where the court just addressed the issue that a complaint that an expert witness improperly vouched for the credibility of the victim by testifying she had validated the child's complaint that she was sexually abused requires a contemporaneous objection to preserve the issue for appeal. This was a state law issue, addressed with state cases, including Kruse v. State, 483 So. 2d 1383 (Fla.4th DCA 1986).

Since none of the foregoing cases, the only ones which were cited in Snowden's direct appeal brief, mentioned the due process clause or the federal constitution, they clearly were insufficient to alert the state court of the due process claim. Not only did this case fail to alert the state court that this claim involved federal constitutional issues, but they also directed the state to answer the claim in state law terms.

The State's answer brief addressed the claim under § 90.703, Florida Statute (1987), which is the section of Florida's evidence code that permits opinion testimony on ultimate issues. The State distinguished Snowden's main cases on the ground that they were decided prior to the adoption of §90.703. The State then relied most heavily on Kruse v. State, 483 So. 2d 1383 (Fla.4th DCA 1986), to

establish that the expert's testimony was properly admissible under §90.703. [A38-A40].

At the time the issue was briefed in state court, there was no state law which held that expert testimony concerning the credibility of victims was not within the scope of §90.703. As such, the State concerned itself solely with the testimony's admissibility under Florida's Evidence Code. This does not mean that there were not federal cases which prohibited such testimony. However, it was Snowden's burden to alert the state court of this and he failed to do so. This is necessary because not every trial error violates due process, since due process concerns a host of requirements to ensure a fair trial. Thus, it was Snowden's burden to specifically explain to the state court how the alleged state evidentiary error violated due process. Absent such a presentation, the state court was not made aware of the scope of Snowden's complaint.

Snowden's reply brief did nothing to challenge the State's position that the claim was nothing more the a state evidentiary error. The reply brief did not allege a due process violation, did not cite federal cases and in fact did not cite any new cases to support his claim. [A45-A46]. Snowden's defense counsel could have made it very clear that he was claiming a due process violation by simply citing to United States v. Azura, 801 F.2d 336 (8th Cir. 1986) which case was cited by the Florida Supreme Court in Tingle v. State, 536 So. 2d 202 (Fla. 1988) for the proposition that the expert testimony testify about the credibility of an alleged child sexual assault victim improperly invades the province of the jury. The federal case could easily have been cited since Snowden's brief was filed in February, 1997 and Azure was decided in September, 1996. Had Snowden's defense counsel cited to Azure he would have alerted the state court that his bolstering claim raised a federal constitutional issue.

The instant decision which holds that a claim is fairly presented to a state court if it presented the "essentially same argument" to the state court without citing federal constitutional principles, is a radical departure from this Court's decision in Duncan. This solitary case has caused a split in authority that will only continue

to widen without guidance from this Court, and therefore this case warrants consideration by this Court

CONCLUSION

Based on the foregoing reasons, the Petitioner, Harry K. Singletary, respectfully requests that this Court grant its Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit and summarily reverse the Eleventh Circuit based on the authorities herein cited .

Respectfully submitted,
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CASE NO.

IN THE UNITED STATES SUPREME COURT

October Term 1997

THE STATE OF FLORIDA,
Petitioner,

vs.

HAROLD SNOWDEN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-4303

D.C. Docket No. 93-100-CIV-NESBITT

HAROLD SNOWDEN,

Petitioner-Appellant,

versus

HARRY K. SINGLETARY, Secretary, Florida Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(February 18, 1998)

Before EDMONDSON, Circuit Judge, and CLARK and WELLFORD[**], Senior Circuit Judges.

---

[2] Honorable Harry W. Wellford, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

EDMONDSON, Circuit Judge:

Harold Snowden ("Snowden"), a state prisoner, appeals the district court's denial of his petition for habeas corpus relief. The petition presented some unexhausted claims and some exhausted claims. Because all issues raised by Snowden in his habeas petition were either totally exhausted in state court or were already procedurally barred from further consideration in state court, we address the claims in the petition that were exhausted. We reverse the district court's denial of Snowden's petition.

Background

In 1996, Snowden was convicted of five counts of child abuse for acts which allegedly occurred at his home, where his wife cared for several children. Snowden was sentenced to two consecutive life terms.

Snowden appealed his conviction to the Third District Court of Appeal of Florida. That court affirmed Snowden's conviction. *See Snowden v. State*, 537 So.2d 1383 (Fla.Dist.Ct.App.1989). The Florida Supreme Court denied discretionary review. *See Snowden v. State*, 547 So.2d 1210 (Fla.1989). Snowden then filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. That motion was denied by the state trial court without an evidentiary hearing. The Third District Court of Appeal of Florida affirmed the trial court's denial of Snowden's petition for post-conviction relief. *See Snowden v. State*, 589 So.2d 911 (Fla.Dist.Ct.App.1991).

Snowden next sought post-conviction relief in federal court and filed a petition for federal habeas relief under section 2254 in the United States District Court for the Southern District of Florida. In June 1994, a magistrate judge issued a report and recommendation stating that relief should be denied. This report and recommendation was adopted by the district court, and relief was denied. Snowden appeals that decision.

Discussion

In this appeal and in his petition for federal habeas relief, Snowden focuses on eight claims of error, including: (1) The state trial court prohibited adequate voir dire, violating his rights to due process and an impartial jury; (2) An expert witness for the State destroyed evidence, violating his rights of due process and confrontation of the witnesses against him; (3) The trial court improperly allowed four adults to testify about alleged-child-victims' hearsay statements, violating his rights of due process and equal protection; (4) The trial court admitted expert witness testimony about the truthfulness of the child witnesses, violating due process; (5) The trial court permitted the State's expert witness to testify that Snowden's counsel was abusive to one of the children during a deposition, violating due process; (6) The trial court allowed evidence of abuse against other children, that is, similar crimes evidence, violating due process; (7) The prosecutor made improper comments during closing argument, violating due process; and (8) The errors, taken cumulatively, violated Snowden's due process rights.[1]

To be appropriate for this court's review, Snowden must have raised these claims in state court to allow the state courts the opportunity to rule on the federal issues: the doctrine of exhaustion of state remedies.

I. Exhaustion of State Remedies and Procedural Defaults

In general, a federal court may not grant habeas corpus relief to a state prisoner who has not exhausted his available state remedies. 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State...."). "When the process of direct review ... comes to an end, a presumption

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[1] In Snowden's petition to the district court for relief he included these claims, along with some others. All the additional claims—trial court bias, exclusion of defense evidence, and denial of psychological reports—were either procedurally barred from federal consideration or lack merit upon which to grant relief. Thus, we do not discuss these claims.

of finality and legality attaches to the conviction.... The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Smith v. Newsome*, 876 F.2d 1461, 1463 (11th Cir.1989) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-92, 77 L.Ed.2d 1090 [1983]).

Exhaustion of state remedies requires that the state prisoner "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365, 115 S.Ct. 887, 888, 130 L.Ed.2d 865 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275-76, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 [1971]) (internal quotation marks omitted). The Supreme Court has written these words:

> [T]hat the federal claim must be fairly presented to the state courts .... it is not sufficient merely that the federal habeas applicant has been through the state courts.... Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies.

Picard, 404 U.S. at 275, 92 S.Ct. at 512. *See also Duncan*, 513 U.S. at 365, 115 S.Ct. at 888 ("Respondent did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment.").

Thus, to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues. "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 5-6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982) (citations omitted).

After examination of the record on appeal, including the trial transcript, Snowden's direct appeal brief, Snowden's petitions for state post-conviction relief, and the district court's order, we believe Snowden's petition for federal habeas relief is a mixed petition: some of the claims were exhausted in the Florida state courts, while other claims were not presented to the state courts for review.[2] A federal

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[2] Snowden properly presented to the state court the federal law issues of the jury voir dire, of the destruction of evidence, of the expert testimony about the truthfulness of the child witnesses, and of his ineffective assistance of trial counsel. Although Snowden did not specifically state on direct appeal that these issues were to be reviewed under the Federal Constitution, he did provide enough information about the claims (including cites to Supreme Court cases) to notify the state courts that the challenges were being made on both state and federal grounds. For example, he presented these points to the state courts:

> 1. "It is apod[i]ctic that a meaningful voir dire is critical to effectuating an accused's constitutionally guaranteed right to a fair and impartial jury." Snowden's Direct Appeal Brief at 66 (citing *Rosales-Lopez v. United States*, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 [1981]).
>
> 2. "The Due Process Clause guarantees an accused access to relevant and material evidence necessary to prepare his defense." Snowden's Direct Appeal Brief at 43 (citing *Barnard v. Henderson*, 514 F.2d 744 [5th Cir.1975]).
>
> 3. "By permitting improper expert testimony to bolster [the child's] credibility—a clear invasion of the jury's sole province—Mr. Snowden was denied a fair trial." Snowden's Direct Appeal Brief at 56.
>
> 4. Snowden specifically raised the issue of ineffective assistance of counsel in his post-conviction petition to the Florida state court. *See State v. Barber*, 301 So.2d 7 (Fla.1974) (ineffective assistance claim properly raised for first time in post-conviction relief petition).
>
> Also, by raising these issues on direct appeal Snowden has exhausted his state remedies, although the issues were only raised

district court ordinarily must dismiss a "mixed" habeas petition (one which contains both exhausted and unexhausted claims) without prejudice—allowing either resubmission of only exhausted claims or total exhaustion. *Rose v. Lundy*, 455 U.S. 509, 519-20, 102 S.Ct. 1198, 1204, 71 L.Ed.2d 379 (1982).

But, when it is obvious that the unexhausted claims would be procedurally barred in state court due to a state-law procedural default, we can forego the needless "judicial ping-pong" and just treat those claims now barred by state law as no basis for federal habeas relief.[3] *See Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 2557 n. 1, 115 L.Ed.2d 640 (1991); *Harris v. Reed*, 489 U.S. 255, 269, 109 S.Ct. 1038, 1046-47, 103 L.Ed.2d 308 (1989) (O'Connor, J., concurring). And, in this case, where all the unexhausted claims are procedurally barred from being considered in Florida courts, it would serve no purpose to dismiss the petition for further exhaustion because review of those claims is unavailable in state courts.[4]

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during state collateral-relief proceedings in the context of ineffective-assistance-of-counsel contentions. *See Castille v. Peoples*, 489 U.S. 346, 349-50, 109 S.Ct. 1056, 1059, 103 L.Ed.2d 380 (1989) ("[O]nce the state courts have ruled upon a claim, it is not necessary for a petitioner "to ask the state court for collateral relief, based upon the same evidence and issues already decided by direct review.' ") (quoting *Brown v. Allen*, 344 U.S. 443, 447, 73 S.Ct. 397, 402, 97 L.Ed. 469 [1953]).

[3] Claims Snowden failed to raise in state court have been procedurally defaulted: they are now procedurally barred from consideration in Florida courts. Because of this default, we cannot review the merit of those claims without a showing by Snowden of both cause for the default and prejudice from the alleged constitutional violation. *See Wainwright v. Sykes*, 433 U.S. 72, 89-91, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977). Snowden seems to make no argument of cause and prejudice for the unexhausted, procedurally defaulted claims. So, we will not consider those claims on the merits.

[4] All alleged mistakes in the state trial court which were presented in federal court were raised in state courts in some manner. But,

The district court's order, by accepting the magistrate judge's report and recommendations, concluded that most of Snowden's claims were procedurally barred under Florida state law and, thus, could not be the source of federal relief. Usually "[a] procedural default bars the consideration of the merits of an issue in federal court only when the state court itself applies the procedural default rule." *Dobbert v. Strickland*, 718 F.2d 1518, 1524 (11th Cir.1983) (citing *Ulster County Court v. Allen*, 442 U.S. 140, 152-53, 99 S.Ct. 2213, 2222, 60 L.Ed.2d 777 [1979]); *see also Rogers v. McMullen*, 673 F.2d 1185, 1188 (11th Cir.1982) ("where "the state courts have not relied exclusively upon [a] procedural default' " federal habeas review is not prevented) (quoting *Thompson v. Estelle*, 642 F.2d 996, 998 [5th Cir.1981]). In this case, the Florida appellate court did not apply procedural bars to those claims of Snowden which he presented to it. *Snowden v. Florida*, 537 So.2d 1383, 1383 (Fla.Dist.Ct.App.1989) ("While we find no merit in any of the numerous points on appeal raised by Snowden, we find worthy of discussion Snowden's contention that the introduction by the State of evidence to show ... similar acts ... infringed upon his right to a fair trial...."). But we believe that the district court correctly concluded that many of the claims were procedurally barred or would effectively be barred by Snowden's failure to raise them at his first Rule 3.850 proceeding.

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only the claims that were raised as federal constitutional issues before the state courts have been exhausted in the state courts. The remaining claims are unexhausted. These claims, however, cannot be further reviewed in state court because Snowden's failure to raise the constitutional issues surrounding the errors in his first post-conviction petition in the Florida courts bars him from raising these new issues in a successive petition. *See Mills v. Florida*, 684 So.2d 801, 804 n. 3 (Fla.1996); *Spaziano v. Florida*, 545 So.2d 843, 844 (Fla.1989) ("Unless petitioner shows justification for failure to raise the present issue[s] in the first petition, the second successive petition pursuant to Florida Rule of Criminal Procedure 3.850 may be dismissed as an abuse of procedure."); *Dyer v. Florida*, 655 So.2d 123, 123 (Fla.Dist.Ct.App.1995) ("Successive petitions for habeas corpus should be denied as an abuse of procedure.") (citations omitted). Snowden has alleged no justifications for his failure to raise all of his claims as federal constitutional issues.

Federal courts may apply state rules about procedural bars to conclude that further attempts at exhaustion would be futile. This step should not be taken if there is a reasonable possibility that an exception to the procedural bar may still be available to the petitioner. *Richardson v. Turner*, 716 F.2d 1059 (4th Cir.1983). As mentioned, we believe the district court properly concluded that no reasonable possibility exists for Snowden, in state court, to raise (as federal constitutional issues) those issues which he failed to raise throughout his direct appeal and in his first state post-conviction petition.

But, about the issues of jury voir dire, destruction of evidence, improper expert testimony about credibility, and ineffective assistance of counsel, we see properly exhausted claims. Because all issues presented are either properly before the federal courts or, in the light of state procedures, now barred from our consideration, we can and will address Snowden's petition partly on the merits.

II. The Merits of the Petition

We need go no further than to address the claimed error of permitting an expert witness to testify about the credibility of other witnesses.

When reviewing a state court evidentiary ruling, generally federal courts "are not empowered to correct erroneous evidence rulings of state trial courts." *Boykins v. Wainwright*, 737 F.2d 1539, 1543 (11th Cir.1984) (citations omitted). "Nevertheless, when a state trial court's evidence rulings deny a habeas petitioner fundamental constitutional protections, this [c]ourt's duty requires it to enforce the constitution's guarantees by granting the petition for a writ of habeas corpus." *Id.* at 1544. Before relief can be granted the error "must rise to the level of a denial of fundamental fairness." *Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir.1984) (quotations and citations omitted). Such fundamental unfairness violates the Due Process Clause of the Federal Constitution. *Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir.1976).

A denial of fundamental fairness occurs whenever the improper evidence "is material in the sense of a crucial, critical, highly significant factor." *Osborne v. Wainwright*, 720 F.2d 1237, 1238 (11th Cir.1983). The evidence at issue in this petition is testimony by an expert witness (Dr. Miranda) that 99.5% of children tell the truth and that the expert, in his own experience with children, had not personally encountered an instance where a child had invented a lie about abuse. These statements were elicited, during the presentation of the State's case-in-chief, by prosecutor's questions which were linked to the expert's interviews with a specific child who testified at the trial—the only child who testified in this case who also was identified by the State as a victim of the crime for which Snowden was on trial. *See* Appendix.

That such evidence is improper, in both state and federal trials, can hardly be disputed. *See, e.g., United States v. Azure*, 801 F.2d 336, 340-41 (8th Cir.1986) (expert testimony about credibility of alleged-child-sexual-assault victim improperly invades province of jury, which "may well have relied on [the expert's] opinion and

surrender[ed] their own common sense in weighing testimony") (internal quotation marks and citation omitted); *Tingle v. Florida*, 536 So.2d 202, 205 (Fla.1988) ("error for the state's witnesses to directly testify as to the truthfulness of the victim; .... the ultimate conclusion as to the victim's credibility always will rest with the jury"). But (and this point bears repeating) not every evidentiary error amounts to a denial of fundamental fairness.

The case against Snowden was based almost entirely upon the stories told by three, young-children witnesses. The oldest, allegedly abused child (and the oldest child witness) was 6 years old at the time of trial; the abuse had supposedly occurred, at least, two years before the trial. The only physical evidence that a child might have been abused by anyone was that one of the children had been treated for an ailment which can be transmitted sexually, but is also transmitted by other means.

And this case is not one in which the prosecution's expert's view of victim credibility was touched on only briefly at the trial. In the prosecutor's argument to the jury, he stressed the significance of the expert's opinion about the credibility of child victims of supposed sexual abuse. Over and over again, the prosecutor hit the point hard, saying this, among other things, about Dr. Miranda's trial testimony:

> Dr. Miranda is a witness who is a real expert in this case.... He is a real expert....
>
> ....
>
> He told you that out of those 1,000 kids [the 1,000 Dr. Miranda had said he had interviewed about sexual abuse], 995 of them told the truth.... That's 99.5 percent of the children.... He said in 99.5 percent of those cases it has been his experience that the children have been telling the truth....
>
> ....
>
> ... That's the opinion of Dr. Simon Miranda. 99.5 percent of the kids tell the truth....

> [Dr. Miranda concluded] that ... there was no evidence that the girl made up the entire story....
>
> ....
>
> ... And, remember, if you don't remember anything else about Dr. Miranda's testimony, just remember two things: That he was qualified as an expert in child sexual abuse 250 times, and that it is his experience that 99.5 percent of the children who report an incident of sexual abuse are telling the truth.

The jury's opinion on the truthfulness of the children's stories went to the heart of the case. This circumstance makes Snowden—against whom there was, otherwise, very little evidence—deserving of relief.[5] *See Gregory v. North Carolina*, 900 F.2d 705, 705-06 (4th Cir.1990) (some physical evidence of abuse, but most damning evidence was erroneously admitted so habeas granted). *Cf. Davis v. Zant*, 36 F.3d 1538, 1546 (11th Cir.1994) (habeas consideration often requires a look to the evidence of guilt of the accused); *McCoy v. Newsome*, 953 F.2d 1252, 1265 (11th Cir.1992) (erroneously admitted evidence "is not crucial, critical and highly significant when other evidence of guilt is overwhelming") (internal quotes and citation omitted); *Adesiji v. Minnesota*, 854 F.2d 299, 300-01 (8th Cir.1988) (where expert opinion of general credibility of child witnesses, which expert had not personally interviewed, mentioned only once and briefly, and where substantial

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[5] The expert's statements were elicited on redirect examination after defense cross-examination. We believe a fair reading of the record shows the defense cross-examination focused on the general methodology for treating abused children, general behavior of abused children, and the information possessed by the expert about this child's previous interviews with other psychologists. The defense cross-examination did not directly spotlight the expert's opinion about a specific child's veracity as the redirect did. That the improper opinion—vouching for credibility—was elicited on redirect examination does not make it less a constitutional error.

other evidence of child abuse, error harmless for habeas purposes). Permitting an expert to vouch forcefully for the children's credibility in this case was a "crucial, critical, highly significant factor." In addition, there was no adequate means to counter such a contention: it truly was this expert's opinion that child witnesses in sexual abuse cases tell the truth.

The district court agreed that the admission of this testimony probably violated state law, but ruled that the evidence did not rise to the level of fundamental unfairness.[6] We cannot agree.

Witness credibility is the sole province of the jury. Very rarely will a state evidentiary error rise to a federal constitutional error; but given the circumstances of the trial underlying this case, we conclude that allowing expert testimony to boost the credibility of the main witness against Snowden—considering the lack of other evidence of guilt—violated his right to due process by making his criminal trial fundamentally unfair. So, we reverse the district court's decision and remand with instructions to grant Snowden's petition for relief, releasing Snowden unless the state affords him a speedy new trial.

REVERSED and REMANDED.

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[6] Although the Florida courts denied relief to Snowden, the state courts did not specifically write about expert testimony on credibility.

APPENDIX

Excerpts of Redirect Examination of Dr. Miranda (by State):

Q: Doctor, when you interviewed [the child witness] and she told you about the incident of sexual abuse, did you find any evidence in your interview that [she] was unable when she described in detail those incidences in detail that she was unable to tell fact from fantasy?

A: I did not.

Q: Did you find any evidence in your interview to indicate to you that when [the child] told you about how she was sexually abused by Grant her babysitter, did you find any evidence to indicate that [she] did not realize the significance of the statements she was making?

A: I did not.

....

Q: Okay. Doctor, in your professional experience bringing into mind that you have interviewed 1,000 kids where there has been an allegation of a sexual abuse, has it been your experience that it is common or uncommon for a child to come into an interview situation with you and make up a fantasy story about being sexually abused and give you specific details and demonstrate with specificity with

anatomically correct dolls, is it common for that type of thing to have been made up?

....

A: It is not a common experience.

Q: I'll grant you that it's possible. Let's talk about how possible. Is it a likely experience, is it unlikely, is it probable, is it unprobable? Can you talk about how possible it is since we know that anything is possible?

....

A: I think that the easiest thing would be for me to answer on the basis of my experience.

Q: You may do so, sir.

A: And if we use fabrication in the strict sense of the word meaning to make up the story ... I have not encountered it but I do not consider it impossible for it to happen.

However, I have had in the cases that I have evaluated a new—and I'm talking about less than ten but maybe more in the realm of five instances that I can recall where the allegations—

Q: Five out of the thousand?

A: Yes....

R. at 7-1745-48.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-4303

HAROLD SNOWDEN,
Petitioner-Appellant,

versus

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent-Appellee.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 04 1998
THOMAS K. KAHN
CLERK

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION(S) EN BANC
(Opinion_____, 11th Cir., 19__, __F.2d__).

Before: EDMONDSON, Circuit Judge, and CLARK and WELLFORD*, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having

requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____
UNITED STATES CIRCUIT JUDGE

ORD-42

*Hon. Harry W. Wellford, Senior U.S. Circuit Judge for the 6th Circuit, sitting by designation.

6/95)

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT
COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1989

HAROLD GRANT SNOWDEN, SR., **

Appellant, **

vs. **CASE NO. 86-1249

THE STATE OF FLORIDA, **

Appellee. **

Opinion filed January 24, 1989.

An Appeal from the Circuit Court for Dade County, Amy Steele Donner, Judge.

Bennett H. Brummer, Public Defender, and Bailey, Gerstein, Rashkind & Dresnick and F. Lee Bailey and Paul M. Rashkind, Special Assistant Public Defenders, for appellant.

Robert A. Butterworth, Attorney General; Janet Reno, State Attorney, and Paul Mendelson, Assistant State Attorney, for appellee.

Before HUBBART, NESBITT and DANIEL S. PEARSON, JJ.

DANIEL S. PEARSON, Judge.

Harold Grant Snowden appeals his convictions on five counts of sexual battery on two children: LB, a female aged four, and her infant brother, JB, aged six months. While we find no merit in any of the numerous points on appeal raised by Snowden, we find worthy of discussion Snowden's contention that the introduction by the State of evidence to show that the defendant had committed on two other children (a five-year-old boy named GW and a six-year-old girl named KM) similar acts of sexual battery--conceded by the defendant to be unobjectionable on relevancy grounds--infringed upon his right to a fair trial when, in violation of Williams v. State, 117 So.2d 473 (Fla.1960), this otherwise admissible evidence became a feature of the trial rather than a minor part of it.

I.

A.

The sanctioned use of similar fact evidence to establish a fact or facts in issue in a criminal prosecution continues to be fraught with the danger of convicting a person not for the crime charged, but for his criminal propensities or bad character. The concern is that "the jury may choose to punish the defendant for the similar rather than the charged act, or the jury may infer that the defendant is an evil person inclined to violate the law." Huddleston v. United States, --- U.S. ----, ----, 108 S.Ct. 1496, 1499-1500, 99 L.Ed.2d 771, 780 (1988).

> "There is no doubt that this admission [to prior unrelated crimes] would go far to convince [persons] of ordinary intelligence that the defendant was probably guilty of the crime charged. But, the criminal law departs from the standard of the ordinary in that it requires proof of a particular crime. Where evidence has no relevancy except as to the character

> and propensity of the defendant to commit the crime charged, it must be excluded."
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> Jackson v. State, 451 So.2d 458, 461 (Fla.1984) (quoting with approval Paul v. State, 340 So.2d 1249, 1250 (Fla. 3d DCA 1976)).

See Peek v. State, 488 So.2d 52 (Fla.1986). But notwithstanding the danger posed by the admission of similar fact evidence, the Florida Supreme Court has for some time adhered to a broad rule of admissibility based on the relevancy of the evidence to a fact to be proved. Williams v. State, 110 So.2d 654 (Fla.1959) [Williams I] (affirming rape conviction where two witnesses, in rebutting anticipated defense of consent, testified to a similar act committed by defendant).[7] This rule that relevant evidence is admissible even if it points to the commission of another crime is now codified in the Florida Evidence Code:

> "Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity."
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> Sec. 90.404(2)(a), Fla. Stat. (1987).

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[7] In Williams I, the court relied on Talley v. State, 160 Fla. 593, 36 So.2d 201 (1948), which affirmed a rape conviction where five women testified about three prior and two subsequent incidents involving the defendant, all of which bore very similar characteristics. The Talley court held that such evidence was admissible if it cast light upon the character of the act under investigation by showing motive, intent, absence of mistake, common scheme, identity, or general pattern of criminality so that the evidence of the prior crime has a relevant or material bearing on some essential aspect of the offense charged.

B.

A year after Williams I, the Florida Supreme Court announced the counterpoise to that decision. In Williams II, [Williams v. State, 117 So.2d 473 (Fla.1960)], where evidence establishing that the murder weapon had been found in the defendant's car also established that the weapon had been found in the course of the investigation of a later murder-robbery committed by the defendant, the court reversed the murder conviction and sentence of death:

> "Inasmuch as evidence of the later crime was admissible only because of its relevancy to the identity of the accused and the murder weapon and the similarity of the pattern defined in the two incidents, the question then arises whether or not the State was permitted to go too far in introduction of testimony about the later crime so that the inquiry transcended the bounds of relevancy to the charge being tried, and made the later offense a feature instead of an incident. This may not be done for the very good reason that in a criminal prosecution such procedure devolves from development of facts pertinent to the main issue of guilt or innocence into an assault on the character of the defendant whose character is insulated from attack unless he introduces the subject.
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> "In the present case we are convinced that the testimony about the subsequent crime was so disproportionate to the issues of sameness of perpetrator and weapon and of design that it may well have influenced the jury to find a verdict resulting in the death penalty [rather than recommending mercy]...."
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> Williams v. State, 117 So.2d at 475-76 (emphasis in original omitted; other emphasis added).

Following Williams II, courts have looked favorably upon the contention that the similar offense was made "a feature instead of an incident" of the trial on the charged offense where it could be said that the similar fact evidence had so overwhelmed the evidence of the charged crime as to be considered an impermissible character attack. Thus, in Reyes v. State, 253 So.2d 907, 907 (Fla. 1st DCA 1971), the court declared that

> "At the conclusion of defendant's case, the State adduced a number of witnesses who testified for a period of almost two days as to prior illegal drug transactions indulged in by defendant. At this stage, the trial progressively developed into a general inquiry as to defendant's character, his propensity to indulge in criminal activities and the numerous crimes he had committed over a long period of time. One hundred forty one pages of this record is devoted to the alleged impeachment of defendant's testimony that he had not used drugs, other than those which were prescribed, prior to the date of his arrest. The rebuttal testimony is replete with evidence of prior specific crimes and hearsay testimony. The feature of the trial quickly faded into the spotlight of a sideshow focusing on the character, general reputation and propensity of defendant Reyes to engage in criminal activities. The Anglo-Saxon system of jurisprudence has not sanctioned such trials since the era of the Star Chamber."

See also Matthews v. State, 366 So.2d 170 (Fla. 3d DCA 1979); Knox v. State, 361 So.2d 799 (Fla. 1st DCA 1978). It is well settled, then, that the rule "that the State should not be permitted to make the evidence of other crimes the feature of the trial" is a limitation on the rule of relevancy. Bryan v. State, 533 So.2d 744, 746 (Fla.1988).[8]

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[8] The court in Bryan v. State, 533 So.2d at 746, suggests that there are three separate limitations to the rule of relevancy: the "feature" limitation; the prohibition against introducing "evidence solely for the purpose

It is clear, however, that similar fact evidence will not be considered to be a feature of the case merely because a large amount

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of showing bad character or propensity in which event it would not be relevant"; and the restriction applicable where "probative value is substantially outweighed by undue prejudice." The second of these is a restatement of the rule of relevancy rather than a limitation on it. The "feature" limitation appears to be a specific application of the more general proscription against prejudice outweighing probative value.

of it comes before the jury.[9],[10] More is required for reversal than a showing that the evidence is voluminous.

> "In itself the mere volume of testimony concerning the prior crime would not necessarily make it a 'feature'.... However, when considered with the additional fact that no limiting instruction was given, the prior crime could well have become a 'feature instead of an incident' of the instant case in the jury's

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[9] In Smith v. State, 344 So.2d 915 (Fla. 1st DCA 1977), disapproved in part, Ruffin v. State, 397 So.2d 277 (Fla.1981), the court held that although the State was entitled to show what happened to the decedent's body and that the defendant and his wife attempted to conceal the killing, the defendant was deprived of a fair trial by the undue emphasis placed on his efforts to hide the killing. As the court pointed out, the wife's testimony about the killing and the events leading up to it, characterized by the court as being "concise yet descriptive," covered 37 pages. Over 115 pages of the transcript dealt with only the burial and cover-up, which the court described as "an intricately drawn picture of the [defendant's] words and deeds." 344 So.2d at 917. The court then engaged in a balancing test to determine whether the prejudice to the defendant outweighed the probative value of the evidence and concluded that "the inquiry conducted by the state concerning the cover-up transcended the bounds of relevancy and became a feature of the case instead of the crime charged in the indictment." Id. The reversal was not, however, based on volume alone.

[10] It follows, of course, that a relatively small amount of similar fact evidence will not by itself be deemed to infringe upon a defendant's fair trial right. See, e.g., Oats v. State, 446 So.2d 90 (Fla.1984) (similar fact evidence--five witnesses to rebut defendant's contention that shooting was an accident--not feature where evidence was relatively brief and incidental); Mitchell v. State, 491 So.2d 596 (Fla. 5th DCA 1986) (similar fact evidence--horrid condition of defendant's other nursing homes admitted to show knowledge and absence of mistake in the condition of defendant's Florida nursing home--not feature where there was relatively small amount of such evidence, and manner in which it was presented prevented it from pervading the case); Pickles v. State, 291 So.2d 100 (Fla. 2d DCA 1974) (similar fact evidence not feature where only fleetingly mentioned).

> mind. They could not be expected to know for what limited purpose the evidence of the prior crime was admitted."
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> Green v. State, 228 So.2d 397, 399 (Fla. 2d DCA 1969).

Thus, in Townsend v. State, 420 So.2d 615, 617 (Fla. 4th DCA 1982), the court stated that "the number of pages of testimony and exhibits should not be the sole test by any means" and went on to conclude that the jury had not been overwhelmed by the evidence because it had been given cautionary instructions no less than twelve times and, despite the quantity of evidence pertaining to the collateral crimes, had acquitted the defendant of one of the charged murders. Likewise, in Headrick v. State, 240 So.2d 203 (Fla. 2d DCA 1970), the court affirmed the defendant's convictions of the burglary and grand larceny crimes charged--rejecting the defendant's argument that the State's evidence covered so many different and separate transactions that it "transcended relevance" and, by its volume (nine witnesses called to establish six other burglaries), constituted an effort by the State to show the bad character or criminal propensities of the accused. See Rogers v. State, 511 So.2d 526 (Fla.1987) (evidence of two other robberies did not become feature of case); Stano v. State, 473 So.2d 1282 (Fla.1985) (same; evidence of eight other murder convictions in sentencing proceedings); Burr v. State, 466 So.2d 1051 (Fla.1985) (same; evidence of three other incidents); Wilson v. State, 330 So.2d 457 (Fla.1976) (same; "extremely extensive" similar fact evidence that spanned over 600 pages approached but did not reach outer boundary where prejudice begins to outweigh probative value); Talley v. State, 160 Fla. 593, 36 So.2d 201 (1948) (same; eight other victims to prove one rape); Johnson v. State, 432 So.2d 583 (Fla. 4th DCA 1983) (no feature merely from volume of testimony); Espey v. State, 407 So.2d 300 (Fla. 4th DCA 1981) (same; score of sexual batteries committed on five other victims to prove one charged crime); Dean v. State, 277 So.2d 13 (Fla.1973) (same; four other victims to prove one rape charge).

Finally, where the defendant's trial strategy causes the similar fact evidence to outweigh the evidence directly relating to the crime

charged, the disparity may be disregarded entirely. In Sias v. State, 416 So.2d 1213 (Fla. 3d DCA 1982), this court rejected the defendant's feature claim, even though more time was spent and evidence presented on the collateral crime than on the charged crime, because the disproportion was caused not by the State going too far, but by the defendant's decision to attack the reliability of the victim's identification and to present an alibi defense to the similar crime. See State v. Maisto, 427 So.2d 1120, 1122 (Fla. 3d DCA 1983) (State not accountable if defendant chooses to dwell on the collateral acts); Blackburn v. State, 314 So.2d 634, 639 (Fla. 4th DCA 1975) (extent of similar fact evidence "grossly aggravated by [defendant's] liberal and extensive cross-examination of the state's witnesses"). See also Medina v. State, 466 So.2d 1046 (Fla.1985).

II.

We have thus far reviewed the law governing the defendant's contention that the evidence of similar acts of sexual battery on GW and KM denied the defendant a fair trial when it became a feature of his trial on charges of sexual batteries on the two children named in the information, LB and JB. Turning now to the particulars of the present case, we have no difficulty in concluding that the concededly relevant and highly probative similar fact evidence introduced by the State did not become the feature of the trial, and thus the introduction of such evidence did not deny the defendant a fair trial before the properly cautioned jury.

A.

At the time of the events in question, Janice Snowden, the defendant's wife, was the babysitter for LB and JB. These children, and others, were left regularly at the Snowden home during daytime hours. Janice Snowden frequently placed the children in her husband's care while she ran errands. The defendant, a South Miami police officer, was home in the daytime because he worked the night shift.

LB, six years old at the time of trial, was the only witness competent to testify to the crimes allegedly committed against her and her infant brother. A short time after the incidents which formed the charges, LB was questioned by her parents, extensively interviewed by a psychologist, and physically examined at the Jackson Memorial Hospital Rape Center.[11] Dr. Laurie Braga, the psychologist--whose

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[11] In 1984, after reading in the newspaper about accusations of child sexual abuse levied against Grant Snowden, LB's mother questioned her four-year-old daughter about whether anything bad had happened to her while at the Snowden house. LB said no. In response to another question, LB denied that Grant had touched her private parts. That evening, Mrs. B talked with her husband, and together they questioned LB again. The child again denied that anything had happened, but her manner of answering --LB looked at the floor and made no eye contact-- made her parents suspicious. Mr. and Mrs. B were not satisfied with the child's answers and felt

interview with LB was videotaped--elicited from the young girl that one time when Janice left the house on an errand, Grant came into the bedroom where she and the baby were and turned off the television. Grant took LB's clothes off first and then his own. Grant then touched his penis to her "pee-pee" and her "butt," placed his hand on her pee-pee, and placed his penis in the mouths of her and her brother. The doctor at the Rape Center examined LB and found that she suffered from vaginal redness, odor, and discharge. After observing a slide (wet smear) under a microscope, the doctor diagnosed LB as having gardnerella vaginitis, a sexually transmitted disease rarely found in young children. LB presented no other physical symptoms of having been sexually abused. About a week later, LB told her mother about what Grant had done to her.

During the two years that passed while the case was being readied for trial, LB's parents brought her to the State Attorney's Office about ten times. Sometimes she would talk to an Assistant State Attorney, and sometimes, not wanting to talk, she would just play.

When she was five, LB was interviewed by another doctor, an expert in child development. Although she was visibly uncomfortable with discussing the incident with this doctor, LB used some anatomically correct dolls to illustrate the various sexual acts that she said Grant had performed on her and her brother. To test her ability to discriminate between various facts, thereby testing the accuracy of her previous statements, the doctor asked LB whether Grant had kissed her pee-pee. LB said no.

LB was also deposed by Snowden's attorneys. In the deposition, LB said things she later denied or which were contradicted by her mother. Thus, at her deposition, she testified, inter alia, that she had told her parents immediately that Grant had done something to her, that Grant touched her pee-pee with only his hand and nothing else, and that Grant had only patted her butt.

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that she was not telling the truth. They contacted the State Attorney's Office and were asked to bring LB in for an interview.

These and other inconsistencies, as well as LB's numerous trips to the State Attorney's Office and the psychologist's videotaped interview, were to later form the basis for Snowden's contention at trial that LB's accusations were complete fabrications born in the leading questions asked by Dr. Braga and nurtured by the retelling in countless interviews at the State Attorney's Office. LB's vaginitis, argued Snowden, was misdiagnosed as a sexually transmitted disease instead of what it really was, a typical rash and vaginal discharge associated with children not yet toilet trained.

B.

To the State's surprise, LB, age six at the time of trial, was unable to identify the defendant in court as the man she knew as Grant, whom she said had molested her. To overcome this deficiency and the inconsistencies between LB's trial testimony and her pretrial responses, and to firmly establish that the defendant was the person who had sexually assaulted LB and her brother, the State presented evidence that Snowden had sexually abused two other young children who had also been left in the daytime care of his wife. This evidence, which Snowden strenuously disputed, consisted of the testimony of a five-year-old boy named GW and his parents, a six-year-old girl named KM and her mother, and certain other witnesses who had examined GW and KM for signs of sexual abuse. Neither of these children presented any physical evidence of having been sexually abused, except that GW was tested twice for oral gonorrhea, first yielding a positive and then a negative test result. After receiving penicillin treatment, GW was again tested, yielding a negative test result.

Snowden's response to the similar fact evidence was to attack the credibility of the children, cast doubt on the veracity of the gonorrhea diagnosis, and argue that these children were also mistaken--that they too had been improperly influenced by a host of concerned parents, prosecutors, and doctors. His objections to the similar fact evidence were, as we have said before, limited to the claim that although the testimony of GW and KM was relevant, the testimony of their supporting casts made their similar fact evidence a feature of the trial. Thus, Snowden made "feature" objections to

testimony of GW's father about what GW had told him and what the defendant said when GW's parents accused him of having molested GW; testimony of a doctor who examined KM and found no physical evidence of sexual abuse; testimony of Janice Snowden that GW and KM were not "problem" children; and testimony of an HRS microbiologist regarding the accuracy of gonorrhea tests and the likelihood and causes of false negative and false positive test results.

The defendant's case consisted of testimony from a psychologist who testified that he had told GW's father to stop putting pressure on his son to say things he was not ready to say--particularly that the defendant had put his penis in GW's mouth. LB's father testified that his daughter had a history of redness and vaginal itching and had initially denied having been molested by Snowden. The defense also called a pathologist who testified that a year and a half after the alleged incident, Snowden had tested negative for gardnerella and that the culture that was performed would have also revealed the presence of gonorrhea. Another doctor testified that gardnerella vaginitis is often misdiagnosed, albeit in adults, particularly where a wet smear, as here, is used. The defendant also presented evidence that his wife was treated in 1982 for vaginal itching and redness, which was diagnosed as trichomonas. She was tested for gonorrhea and syphilis in 1984, but did not require treatment. Finally, the defendant offered the videotape of the Braga interview to show that LB had been brainwashed.

On the State's rebuttal, Dr. Braga explained the techniques that the jury saw in the videotaped interview of LB and denied having brainwashed LB.

Throughout the trial, the court, the State, and the defense repeatedly reminded the jury of the limited purpose for which the similar fact evidence was being received. In his opening statement, the defendant's attorney cautioned the jury that, although they would be hearing testimony of collateral crimes, they were not being asked to decide the guilt or innocence of Snowden as it related to these other children. Before any testimony relating to the collateral crimes was introduced, and again at the close of the evidence, the court instructed the jury on the limited use of the evidence and that the defendant was

not on trial for crimes not charged in the information. Both the State's and the defendant's closing arguments centered on the acts charged in the information and the testimony and credibility of LB. The similar fact evidence was used by the State simply to show the identity of the defendant and to rebut the defense's contention that LB was lying: it was just not possible, the State argued, to have three children fabricate such identical stories. The defense also repeatedly reminded the jury in closing that the defendant was not on trial for acts that KM and GW testified about and that it would not be fair to convict him based on his bad character.

III.

We are convinced that the similar fact evidence introduced in this case did not become a feature of the trial so as to unfairly prejudice the defendant. First, the jury was appropriately and repeatedly instructed on the proper use of the evidence. See Oats v. State, 446 So.2d 90, 94 (Fla.1984) (trial court's twice reading cautionary instructions to the jury concerning similar fact evidence "more than corrective" against claim of feature). No argument made by counsel for the State was inconsistent with these instructions, and, indeed, both counsel's arguments reminded the jury that their duty was limited to deciding the narrow question of the defendant's guilt of sexually battering LB and JB. Second, the amount of the similar fact evidence, when compared to the amount of evidence directly relating to the charged crimes, was not excessive. [12] Third, a substantial

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[12] The defendant calculates the respective amounts of testimony by erroneously excluding portions of testimony which he describes as "general in nature or which are not uniquely applicable to 'charged crimes' or 'other crimes.' " These include the qualifications of expert witnesses who testified as to all victims; the testimony of Janice Snowden and Thomas Helms, who both established Janice's babysitting habits; and general testimony relating to laboratory procedures. The defendant argues that these pages are properly discounted "since they apply equally to 'charged crimes' and 'other crimes.' " In our view, all of this evidence is properly attributed to charged crimes because the State would have introduced it whether or not it introduced the similar fact evidence. Therefore, our calculation, which includes all of the evidence, is not as lopsided towards the collateral crimes as is the defendant's

portion of the similar fact evidence was adduced by the defendant himself, and such imbalance as there may have been is, at least in part, attributable to him. Fourth, in a prosecution such as this which depends almost entirely on the credibility of a very young child, it is often necessary for the State to prove the charges by pieces of evidence other than the child's live testimony. This problem of proof occurs whether the incident to be proved is the charged crime or the similar act that fills in the gap in the State's ability to prove the charged crime. Indeed, the defendant's closing argument recognized the acute difficulty of proving this case. See Bourjaily v. United States, 483 U.S. 171, ----, 107 S.Ct. 2775, 2781, 97 L.Ed.2d 144, 155 (1987) ("[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts."). Fifth, as the Florida Supreme Court said recently in Heuring v. State, 513 So.2d 122 (Fla.1987), there is a need to corroborate the testimony of child victims through the use of similar fact evidence:

> "Cases involving sexual battery committed within the familial context present special problems. The victim knows the perpetrator, e.g., a parent, and identity is not an issue. The victim is typically the sole eyewitness and corroborative evidence is scant. Credibility becomes the focal issue. In such cases, some courts have in effect relaxed the strict standard normally applicable to similar fact evidence. These courts have allowed evidence of a parent's sexual battery on another family member as relevant to modus operandi, scheme, plan, or design, even though the distinction between sexual design and sexual disposition is often tenuous. We find that the

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and is more useful in deciding whether sheer volume is an important factor. According to Snowden's calculation, more than two-thirds of the witnesses and one-half of the testimony were devoted to similar fact evidence; according to our calculation, less than one-half of the witnesses and only one-third of the testimony were devoted to similar fact evidence.

better approach treats similar fact evidence as simply relevant to corroborate the victim's testimony, and recognizes that in such cases the evidence's probative value outweighs its prejudicial effect."

513 So.2d at 124-25.

See Beasley v. State, 518 So.2d 917 (Fla.1988); Calloway v. State, 520 So.2d 665, 667 (Fla. 1st DCA 1988) (testimony of two other girls that they too had been molested by victim's stepfather properly bolstered credibility of victim, which was "the focal issue in the case"); Espey v. State, 407 So.2d 300, 302 (Fla. 4th DCA 1981) ("Where a seven year old child is the only eye witness the jury may well find the testimony incredible, as if coming from a deranged fanciful child unable to perceive the true gravity and dire consequences of her accusations.").

IV.

The similar fact evidence introduced in this case was not a needless attack on the defendant's character. It did not become a feature of the case in any respect, and its introduction did not transcend its relevance. The jury was well and consistently advised about the proper use of the similar fact evidence, thereby minimizing any danger that it might convict the defendant because of uncharged misconduct. Accordingly, the defendant's convictions are

AFFIRMED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

CASE NO. 86-1249

HAROLD GRANT SNOWDEN, SR.,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY, CRIMINAL DIVISION

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III

THE TRIAL COURT ERRED BY IMPROPERLY ADMITTING PRIOR CONSISTENT STATEMENTS OF LOREN BRUTKKIEWICZ AND EXPERT TESTIMONY OF BOLSTER HER CREDIBILITY.

There is no axiom more firmly entrenched in our system of law than that a jury is the sole arbiter of the credibility of witnesses. Barnes v. State, 93 So.3d 863, 864 (Fla. 1957), see also, Bowles v. State, 381 So.2d 326 (Fla. 4th DCA 1980); Silvestri v. State, 332 So.2d 351 (Fla. 3rd DCA 1976). Thus, convictions have been reversed when doctors have been permitted to opine about the truthfulness or credibility of a victim's allegations. Holliday v. State, 389 So.2d 679 (Fla. 3rd DCA 1980); Farley v. State, 324 So.2d 662 (Fla. 4th DCA 1975). Such testimony is ". . . a clear invasion of the province of the jury." Holliday v. State, supra, at 680.

Both Dr. Miranda and Dr. Braga were permitted to state their expert opinions about Loren's truthfulness, thereby bolstering her credibility. By allowing expert testimony to vouch for Loren's credibility, the court committed error. Since the defendant posited appropriate objections, it is reversible error. See Norris v. State, __So.2d__ (Fla. 5th DCA 1987), 12 FLW 306 (January 30, 1987).

The State was permitted to have Dr. Miranda bolster the credibility of Loren when he was allowed to testify that in his experience only 5 of 1,000 children fabricated a claim of sexual abuse. (T. 1302-08). Defense counsel immediately moved for a mistrial on the ground that the Dr. was testifying that he is 99.5% sure Loren was being truthful. The motion was denied, but, sure enough, in closing argument the State argued that it is Dr. Miranda's "experience that 99.5 percent of the children who report an incident of abuse are telling the truth." (T. 2358).

Dr. Braga was permitted, over defense objection, to bolster the credibility of all of the child witnesses. She testified that a young child cannot fabricate an event of sexual abuse, that young children cannot be brainwashed, and that she is unable to get a child to say

something that is not true. (T. 2266). She also testified that the pattern of disclosure by Loren Brutkiewicz was consistent with the pattern of disclosure for sexually abused children. (T. 2270).

Thus, two expert witnesses were allowed to bolster the credibility of Loren and the other two child-witnesses. And this testimony carried with it the imprimatur of the court's expert witness instruction which allowed the jury to accept from experts opinions on any subject in which the jury believed the witness to be an expert. (T. 2468). Since both witnesses. were qualified as experts in child psychology, the testimony combined with the instruction yielded a virtual summary judgment on the subject of the childrens' credibility.

This was a prosecution which rested exclusively on the credibility of Loren. Is she was not believed, acquittal was certain. By permitting improper expert testimony to bolster Loren's credibility -- a clear invasion of the jury's sole province -- Mr. Snowden was denied a fair trial.

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III

THE TRIAL COURT CORRECTLY ADMITTED EVIDENCE OF LOREN BRUTKIEWICZ' STATEMENT TO HER MOTHER AS A PRIOR CONSISTENT STATEMENT AND HER STATEMENT TO DR. MIRANDA AS A PRIOR CONSISTENT STATEMENT AND AS A STATEMENT FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT AND CORRECTLY ALLOWED DR. MIRANDA AND DR. BRAGA TO RELATE THEIR EXPERIENCE WITH SEXUALLY ABUSED CHILDREN.

B.

Admission Of Expert
Testimony On Child
Sexual Abuse Victims

Dr. Miranda, who was qualified as an expert in child sexual abuse (T. 1631-1643), and Dr. Braga, who was qualified as an expert in child development, pattern of disclosure by sexually abused children and interviewing techniques while dealing with sexually abused children (T. 2644-2649, 2672), testified about their extensive with sexually abused children. While the defendant on appeal does not challenge their expertise or claim that their testimony was beyond their expertise, he does contend that both Dr. Miranda and Dr. Braga were improperly allowed to bolster Loren's credibility. This contention is meritless.

The defendant claims that Loren's credibility was improperly bolstered in three instances, to wit:
(1) Dr. Miranda's testimony that in his experience only five out of 1,000 children fabricated a claim of sexual abuse (T. 1746-1748, 1752); (2) Dr. Braga's testimony that a young child cannot fabricate an event of sexual abuse, cannot be brainwashed and cannot be made to say something that is not true (T. 2698, 2699), and (3) Dr. Braga's testimony that Loren's pattern of disclosure was consistent with the

pattern of disclosure for sexually abused children. (T. 2700-2703). As support for this claim, the defendant relies primarily on Holiday v. State, 389 So.2d 679 (Fla. 3d DCA 1980), and Farley v. State, 324 So.2d 662 (Fla. 4th DCA 1975). These cases are not germane to this case.

In Holiday, this court stated the long-standing view that one witness may not directly testify that another witness testified truthfully. No such testimony was elicited in this case. In Farley, the court held that a witness was improperly allowed to expressly give his expert opinion that the victim was raped. Again, this case is not on point since neither Dr. Miranda nor Dr. Braga expressly stated that Loren was sexually abused. Moreover, Farley was decided before the adoption of the evidence code, which allows for opinion testimony on the ultimate issue. Section 90.703, Fla. Stat. (1987). Accordingly, it is of doubtful applicability to this case. Bloodworth v. State, 504 So.2d 495 (Fla. 1st DCA 1987); Kruse v. State, 483 So.2d 1383 (Fla. 4th DCA 1986); Ferradas v. State, 434 So.2d 24 (Fla. 3d DCA 1983).

The Florida case most on point is Kruse, since it deals specifically with expert testimony on child sexual abuse victims. In Kruse, Dr. Donna Holland, an expert in child and adolescent psychiatry, was allowed to describe the condition of Post-Traumatic Stress Syndrome and to correlate her observations of the sexually abused child victim's behavior with commonly observed behavior patterns of other syndrome patients. Dr. Holland was also allowed to opine, based upon her psychiatric examination and the child's behavior before and after the abuse, that the child had suffered a sexual trauma. As recognized in Kruse, expert testimony is important in explaining the behavior of a child's sexual abuse victim, so that the jury may properly evaluate the child's testimony. While jurors can rely on their own experience in evaluating the behavior of an adult, they cannot properly evaluate the behavior of a child without expert assistance.

Also of prime importance in resolving this issue is the role played by the defense in eliciting the evidence. It is well-established that a defendant who has challenged the probative value of the State's evidence has "opened the door" to evidence which responds to the challenge. Walton v. State, 481 So.2d 1197 (Fla. 1985); Bloodworth

v. State, supra; Tosh v. State, 424 So.2d 97 (Fla. 1st DCA 1982); White v. State, 348 So.2d 1170 (Fla. 3d DCA 1977).

The State submits that a consideration of the expert testimony of Dr. Miranda and Dr. Braga in its proper context establishes that the testimony was properly admitted. The first complaint of improper bolstering of Loren's credibility occurred when Dr. Miranda testified that he has interviewed approximately 1,000 children who were allegedly sexually abused and only about five fabricated the allegation of sexual abuse. (T. 1746-1748, 1752). [32] Prior to this testimony, defense counsel in his opening argument had told the jury that Loren had initially told her parents that she had not been molested by the defendant and they believed her. (T. 1318-1319). He also argued that the parents of all the victims will testify that their children are typical and are not above making things up. (T. 1325). On cross-examination, defense counsel elicited from Loren an admission that she has lied before (T. 1413), and from her mother, testimony that Loren has lied and has an imagination. (T. 1563).

Despite the defendant's efforts to convince the jury that Loren was fabricating her accusation of sexual abuse, the prosecutor did not ask Dr. Miranda any questions on direct as to the likelihood of a child fabricating an accusation of sexual abuse. [33] Nevertheless, Dr. Miranda was asked on cross if it is possible for a child of Loren's age to fabricate an incident of sex abuse. (T. 1724). Defense counsel continued this line of questioning, and elicited from Dr. Miranda, testimony that a child may fabricate an allegation of sexual abuse because she may not realize the significance of what she is saying, with the caveat that it is highly unlikely for a child to fabricate an

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[32] Dr. Miranda also testified that in all the cases in which the allegation was fabricated the child had been assisted by another in making a false accusation, an indicated that custody litigation was the type of situation in which fabrication would occur. (T. 1748, 1752).

[33] Dr. Miranda did testify on direct that a sexually abused child of Loren's age will often initially deny that they were sexually abused and as a rule finds it most difficult to tell her parents of the abuse. (T. 1667, 1668). No objection to this testimony was raised at trial or on appeal.

allegation of sexual abuse without some help in making up the story. (T. 1727). Dr. Miranda then admitted, in response to an obvious reference to Loren's case, that a child could be telling the truth when she twice tells her parents that she was not sexually abused. (T. 1727, 1728).

Thus, before Dr. Miranda testified as to the very small probability of a child fabricating an allegation of sexual abuse, the defense had either argued or presented testimony that all the child victims had made things up, and that Loren had told her parents that she had not been sexually abused an had lied before, and established through Dr. Miranda that a child like Loren could possibly fabricate an allegation of sexual abuse. In order to properly determine the likelihood that Loren and the other children had fabricated their allegations of sexual abuse, the jury required the assistance of an expert on sexually abused children. Dr. Miranda properly provided this assistance, and effectively closed the door, which had been opened by defense counsel, when testified that 99.5 percent of the children he had interviewed, who claimed that they were sexually abused, were not fabricating.

In addition to Kruse, which recognizes the importance of expert testimony in child sexual abuse cases, another Florida case supporting the admission of Dr. Miranda's testimony is Bloodworth v. State, supra. In Bloodworth, a physician testified on direct that the trauma, which he observed on a sexual battery victim, was consistent with unaroused, unlubricated intercourse, and inconsistent with lubricated intercourse. On cross-examination, the expert testified that there could have been consensual intercourse with insufficient lubrication but only under very rare and selected circumstances. The expert then testified, in a manner directly analogous to Dr. Miranda, that he has examined may women in his OB/GYN practice and has never observed in such patients trauma like that of the subject victim. On redirect, the expert was permitted to go further than Dr. Miranda, and testified that in his expert opinion the victim had engaged in recent non-consensual intercourse. The court upheld the admission of this evidence because the defense had attempted to create an inference of consensual sex.

Applying Bloodworth to this case, Dr. Miranda could have testified that Loren was sexually abused, (See also Kruse v. State, supra, and Ferradas v. State, supra), in response to defendant's attempt to create an inference that she had fabricated her allegation of sexual abuse. The testimony in issue in this case, which did not go so far, therefore properly admitted.

Another case which indicates that the prosecutor could have gone much further than he did in eliciting testimony from Dr. Miranda as to the possibility that Loren was fabricating is State v. Geyman, 729 P.2d 475 (Mont. 1986). In Geyman, a clinical psychologist was asked about his general experience with children in the area of sexual abuse. He replied that this general experience and research reveals that children don't make up stories of sexual abuse and that a false accusation of sexual abuse occurs in well under five percent of cases. He then gave his expert opinion that the victim was truthful when he said he was sexually assaulted. In determining whether this testimony was properly admitted, the court, as did the court in Kruse, analyzed the crucial question of whether the testimony was helpful to the trier of fact. In finding that it was, the court quoted from State v. Myers, 359 N.W.2d 604, 609, 610 (Minn. 1984) at 729 P.2d 478:

> With respect to most crimes the credibility of a witness is peculiarly within the competence of the jury, whose common experience affords sufficient basis for the assessment of credibility. In most cases, even though an expert's testimony may arguably provide the jury with potentially useful information, the possibility that the jury may be unduly influenced by an expert's opinion mitigates against admission. Nor should the credibility of witnesses in criminal trials turn on the outcome of a battle among experts. The nature, however, of the sexual abuse of children places lay jurors at a disadvantage. Incest is prohibited in all or almost all cultures, and the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child who complains of sexual abuse. If the victim of a burglary failed to report the crime

> promptly, a jury would have good reason to doubt that person's credibility. A young child subjected to sexual abuse, however, may for some time be either unaware or uncertain of the criminality of the abuser's conduct. As [the expert] testified, uncertainty becomes confusion when an abuser who fulfills a caring-parenting role in the child's life tells the child that what seems wrong to the child is, in fact, all right. Because of the child's confusion, shame, guilt, and fear, disclosure of the abuse is often long de
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> In the case of a sexually abused child consent is irrelevant and jurors are often faced with determining the veracity of a young child who tells of a course of conduct carried on over an ill-defined time frame and who appears an uncertain or ambivalent accuser and who may even recant.
> Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children, and particularly of children as young as this complainant.

Because expert testimony is so essential to a proper resolution of a child sexual abuse case, the court in Geyman upheld the admission of an expert's opinion that the child victim was truthful when he testified that he was sexually assaulted. In this case the admission of general testimony as to the very small amount of false accusations of child sexual abuse, which was also approved of in Geyman, should be upheld.

The similar testimony of Dr. Braga that a young child cannot fabricate an event of sexual abuse cannot be brainwashed and cannot be made to say something that is not true. (T. 22698, 2699), was also properly admitted. When this testimony was introduced, defense counsel's objection because the prosecutor's question assumes facts not in evidence was overruled, and an objection to Dr. Braga's attempt to

explain what she would do if she could brainwash kids was sustained. (T. 2698, 2699). No objection that the testimony constituted bolstering of Loren's credibility was made. Accordingly, the defendant has not preserved the admission of this testimony for review. Norris v. State, 503 So.2d 911 (Fla. 5th DCA 1987); Kruse v. State, supra.

In any event, the testimony was properly admitted. As previously detailed, the defense attempted to raise the possibility that Loren was fabricating her allegation of sexual abuse. As part of this failed attempt, defense counsel elicited from Loren's mother on cross and from her father, who was called as a defense witness, the admission that they believed Loren when she initially denied that she had been sexually abused. (T. 1588, 2388-2392). In addition, the defense, throughout trial, attempted to raise the possibility that Loren was falsely accusing the defendant of sexual abuse. Accordingly, Dr. Braga's expert testimony which aided the jury in determining whether these attempts to undermine Loren's credibility were valid, was properly admitted.

A case indistinguishable from this case is State v. Myers, supra. In Myers, a clinical psychologist, who saw the child victim of sexual abuse, testified that it is extremely rare for children to fabricate tales of sexual abuse and stated that in her opinion the victim was truthful in her allegations. After acknowledging the importance of expert testimony in child sexual abuse cases (see supra), the court held that since the defense had elicited testimony from the victim's mother that she did not believe the victim for several months, the responsive expert opinion testimony that the victim was telling the truth was properly admitted. Thus, under Myers, Dr. Braga could have testified that Loren was telling the truth, since the defense opened the door to expert testimony on her credibility. Dr Braga did not go so far, however, and her testimony that children cannot fabricate an event of sexual abuse and cannot be brainwashed was surely properly admitted. State v. Dale, 75 Or. App. 453, 706 P.2d 1009 (1985); State v. Raye, 73 N.C. App. 273, 326, S.E.2d 333 (1985).

The final argument raised by the defendant under this point is that Dr. Braga was improperly allowed to testify that Loren's pattern of disclosure was consistent with the pattern of disclosure for sexually

abused children. (T. 2699-2703). Again, there was no improper bolstering objection made to this evidence, and its admission has therefore not been preserved for review.

Furthermore, since Loren's initial denial of sexual abuse and her retraction to a limited extent when deposed by defense counsel were major parts of the defense, this testimony of Dr. Braga which enabled the jury to better understand why Loren acted this way was properly admitted. Kruse v. State, supra. As stated by the court in State v. Middleton, 294 Or. 427, 657 P.2d 1215, 1220 (1983), in upholding the admissibility of similar expert testimony

> It would be useful to the jury to know that not just this victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the witness's credibility.

The admission of expert testimony about the patten of disclosure of sexually abused children to help the jury understand why a victim had not immediately and consistently stated that she was sexually abused was also upheld in People v.Payan, 220 Cal.Rptr. 126 (Cal. App. 2nd Dist. 1985); and Smith v. State, 688 P.2d 326 (Nev. 1984).

In conclusion, the State submits that Dr. Miranda and Dr. Braga were properly allowed to relate their professional experience with sexually abused children which was designed to help the jury to determine if Loren was telling the truth but which did not make this determination for them. This is especially true since the defendant did everything he could to try to convince the jury that Loren was not telling the truth. At any rate, since Loren's testimony was overwhelmingly supported by her prior consistent statements, the undisputed expert testimony of Dr. Miranda and Dr. Braga, the evidence that she had gardnerella vaginitis, and the collateral crimes evidence, any error which allegedly occurred in the admission of

evidence which allegedly improperly bolstered her credibility was harmless. Harrell v. State, 486 So. 2d 7 (Fla. 3d DCA 1986).

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

CASE NO. 86-1249

HAROLD GRANT SNOWDEN, SR.,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY, CRIMINAL DIVISION

REPLY BRIEF OF APPELLANT

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B.

IMPROPER ADMISSION OF EXPERT TESTIMONY TO BOLSTER CREDIBILITY

Unable to deny the impact of the law of this District, the State resorts to cases from foreign jurisdictions and other district courts of appeal. The fact remains that Holliday v.State, 389 So.2d 679 (Fla. 3d DCA 1980) is the law of the Third District and no reason has been demonstrated why it should be ignored. The State misapprehends the law when it suggests that the Defendant opened the door to "credibility bolstering" expert evidence when it questioned the credibility of the child's credibility. This misapprehension is made clear in the State's Brief, page 49: "In order to properly determine the likelihood that Loren and the other children had fabricated their allegations of sexual abuse, the jury required the assistance of an expert on sexually abused children." Such evidence is not expert testimony; it is merely "the doctor's personal opinion, and its admission as evidence was a clear violation of the province of the jury." Holliday, at 680. Dr. Braga's testimony that a young child cannot fabricate an event of sexual abuse, that young children cannot be brainwashed, and that she is unable to get young children to make false claims, is pure personal opinion. And Dr. Miranda's statement that 99.5% of children who report sexual abuse are truthful is also pure personal opinion; i.e.,if the children never admit their false claims, how does the Dr. know whether it is true or false - he must necessarily make this evaluation based on personal opinion. The lack of expertise in the opinions of the two witnesses is further highlighted by the fact that they don't agree - one says children never can be made to lie about such events, while the other says some children can be made to lie. In the end, though, the statements are pure personal opinion which dramatically bolstered the credibility of the child-witnesses. As in Holliday, the improper admission of this evidence is prejudicial and requires reversal. At. 681.

MR. RABEN: We want to put on the record we are moving for mistrial and we believe this court and the court allows this question violates the Court's previous order in refusing to allow any experts to make an ultimate determination of the child's credibility and that's essentially what he's doing by answering this question.

D. Bolstering Credibility

Petitioner alleges that at trial the prosecution was improperly allowed to admit into evidence expert testimony purely for the purpose of bolstering the credibility of the victims. Petitioner has cited ample state law to support the proposition that the evidence was improperly admitted in violation of state laws of evidence. The state court, however, addressed this complaint on direct appeal and found it to be without merit.

Now, the same argument is being made to support a due process violation claim. The standard here is not based upon state rules of evidence. Rather, the standard is that the violation must rise to such a magnitude as to deny fundamental fairness of the criminal trial, thus violating the due process clause. Hills, 529 F. 2d at 401. As noted above, this standard is very strict in its application. Id. see also, Heads, 468 F.2d at 240, Corpus v. Beto, 469 F. 2d 953 (5th Cir. 1972). This court finds that the alleged violation does not rise to the level necessary to grant habeas relief.